

OVERVIEW OF NEW ACT 381 AMENDMENTS

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1. Introduction. On December 27, 2007, the Governor signed a package of four bi-partisan bills that amended Act 381 of 1996 (Public Acts 201-204 of 2007). The bills included various changes to Act 381, many of which are significant.
2. Extends sunset date. There was a sunset date of December 31, 2007 for MDEQ OR MEGA approval of Act 381 work plans. The legislation extended the sunset date to December 31, 2012.
3. New eligible activities. Act 381 authorizes an authority to reimburse a developer for certain “eligible activities.” The legislation added the following “eligible activities”:
 - a. Reasonable costs of developing and preparing brownfield plans and work plans.
 - b. Demolition and lead or asbestos abatement on brownfield property that is not located in a qualified local governmental unit (core community), whether or not it is a “facility”.
 - c. Reasonable costs of environmental liability insurance that is not otherwise required by state or federal law.
 - d. Costs incurred by a land bank to acquire property for economic development purposes.
4. Adds basis for “blighted” determination. Under Act 381, a property is eligible if it is a “facility”, “functionally obsolete”, or “blighted.” The act contains criteria for determining when a property is considered “blighted.” The legislation adds one criterion to this list. A property can now be considered “blighted” if it has substantial subsurface demolition debris buried on site so that the property is unfit for its intended use.
5. Increases and clarifies maximum duration of brownfield plan and TIF capture. Act 381 limited the duration of a brownfield plan to 30 years. The legislation increases this maximum duration to 35 years and clarifies that the duration applies separately to each eligible property. The duration begins for a particular eligible property when the plan is amended to add that property. In addition, the legislation added a maximum duration of 30 years for capturing tax increment revenues for each eligible property. The brownfield plan must identify the beginning date for this capture, which can be any date within 5 years after the plan amendment adding the property. The legislation also authorizes an authority to amend the beginning date at any time before the authority has begun to reimburse the costs of eligible activities on the eligible property.

6. Changes notice and hearing requirements. Act 381 requires a BRA to give certain notices and requires the municipal governing body to hold a public hearing before adopting a brownfield plan. The legislation changes these requirements and adds additional requirements as follows:
 - a. Requires two public notices of a hearing to approve a brownfield plan, both of which must occur between 10 and 40 days before the hearing.
 - b. The municipal governing body may delegate the public hearing process to the authority or to a subcommittee of the governing body.
 - c. Requires an authority to give the MEDC or MDEQ at least 10-days notice of a brownfield-plan hearing if the plan involves activities requiring each agency's respective approval.
 - d. Requires an authority to give the MDEQ and MEDC notice within 30 days after the authority amends the beginning date for TIF capture.
7. Allows an authority to use school taxes to reimburse interest. The legislation clarifies the law by allowing an authority to approve the use of taxes levied for school operating purposes, with the MDEQ's approval, to reimburse interest associated with environmental eligible activities and, with MEGA's approval, to reimburse interest associated with non-environmental eligible activities, such as demolition, public infrastructure and site preparation, remains subject to the MEDC's approval.
8. Allows reimbursement for pre-brownfield-plan environmental activities. The legislation authorizes an authority to use tax increment revenues attributable to local taxes to reimburse the reasonable costs of site investigation activities, BEAs, and due care activities that occur before the municipality adopts a brownfield plan if the costs are included in the brownfield plan.
9. Eliminates the work-plan-approval requirement for some activities. Under the previous version of Act 381, the MDEQ must approve a work plan for environmental eligible activities before an authority can use school TIF to reimburse the costs of those activities. The legislation eliminated this work-plan-approval requirement (which means that an authority can now approve the use of taxes levied for school operating purposes without MDEQ approval) for the following activities:
 - a. Site investigation activities required to conduct a BEA and to evaluate due care activities required under Part 201.
 - b. Conducting a BEA.
 - c. Preparing a due care plan to comply with Part 201.
10. Streamlines work-plan-approval process. The legislation attempted to streamline the MDEQ approval process with the following changes:
 - a. Work-plan approval. Authorizes the MDEQ to approve a work plan if:

- i. the activities in the plan are “eligible activities” under Act 381;
 - ii. the activities in the plan are protective of the public, health, safety and the environment; and
 - iii. the costs of the activities as a whole are reasonable.
- b. Work-plan denial. Addresses the ability of the MDEQ to deny an activity in a work plan, including the following changes:
 - i. The MDEQ may deny a work plan if the property is not an “eligible property” and may deny any specific activity in the work plan if:
 - (1) the activity will benefit a liable party;
 - (2) the activity was conducted before the brownfield plan was approved—other than the reasonable costs of preparing and reviewing the work plan; and
 - (3) the activity does not satisfy the work-plan-approval criteria, but only if the MDEQ cannot conditionally approve the activity by delineating modifications needed to satisfy the criteria or if the MDEQ needs additional information to analyze whether the activity satisfies the criteria.
 - ii. The MDEQ must send a letter that explains with specificity the reason for the denial.
 - iii. For any activity in a work plan that the MDEQ cannot deny, the MDEQ must either unconditionally approve, conditionally approve, or request additional information.
 - iv. Activities that the MDEQ denies can be resubmitted in another work plan.
- c. MDEQ request for additional information. Act 381 allows the MDEQ to request additions or changes to a work plan if the plan lacks sufficient information for the MDEQ to unconditionally approve the plan. The legislation requires the MDEQ to review the additional information and provide one of the authorized responses to the activity within 45 days after receiving the additional information. If the MDEQ does not provide a response within this time frame, the activity is considered approved.
- d. Activities more protective than required by Part 201. Authorizes the MDEQ to approve activities in a work plan that are more protective of the public health, safety, and welfare and the environment than required by Part 201 if those activities provide public health or environmental benefit, for which the MDEQ may consider:

- i. Proposed new land use and reliability of restrictions to prevent exposure to contamination;
 - ii. Cost of the activities required to comply with Part 201, cost of the additional activities, and the cost of all activities; and
 - iii. Long-term obligations associated with leaving contamination in place and the value of reducing or eliminating these obligations.
 - e. MDEQ's denial is a final decision only in regard to school TIF. The legislation clarifies that the MDEQ's denial of a work plan constitutes a final decision in regard to school TIF, which an aggrieved person may appeal in circuit court. But the MDEQ's decision does not restrict an authority's use of local TIF under Act 381.
 - f. Extension by mutual agreement. The legislation clarifies that the MDEQ and an applicant may mutually agree in writing to extend any work-plan-review period.
11. Increases annual cap on an authority's reimburseable costs. Act 381 previously allowed an authority to use up to \$75,000 annually of local taxes to pay for the authority's reasonable and actual administrative and operating expenses; BEAs, due care activities, and additional response activities conducted by or on behalf of the authority; and the reasonable costs of preparing a work plan. The legislation increases this annual \$75,000 cap depending on the number of active projects. If an authority has fewer than 6 active projects, the cap is now \$100,000. This cap increases by \$25,000 for every five active projects thereafter until an authority has 25 active projects. When an authority has more than 25 active projects, the cap increases to and is frozen at \$300,000. An active project is a project for which the authority is currently capturing tax increment revenues under a brownfield plan.
12. Modifies the definition of "specific taxes." This change allows taxes captured under the commercial rehabilitation act to be captured under a brownfield plan, similar to the treatment of various other tax incentive programs.